Petition

81-553

IN THE SUPREME COURT OF THE UNITED STATES

Office - Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

NO. _____

EDWIN F. GORDON,

Petitioner

v.

JOHN HEIMANN, United States Comptroller of the Currency; JOHN G. HENSEL, Regional Administrator of National Banks, Sixth National Bank Region, Atlanta, Georgia; H. GARY PANNELL, Atlanta, Georgia,

Respondents

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL RESERVE BANK OF ATLANTA: MONROE KIMBREL, President, Federal Reserve Bank of Atlanta; HOBERT E. EARLY, Atlanta, Georgia,

Respondents

v.

SECURITIES AND EXCHANGE COMMISSION; JULE B. GREENE, Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOSEPH L. GRANT, Assistant Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOHN M. KELLY, Regional Counsel, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Office - Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

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Date: August 25, 1981

QUESTIONS PRESENTED FOR REVIEW

1. Is Federal agency action or inaction subject to judicial review by way of mandamus where such action is shown to be unreasonable, arbitrary, capricious, or an abuse of discretion?

2. Does the plenary authority of the Board of Governors of the Federal Reserve as well as the Comptroller of the Currency to order restitution provide petitioner with standing to seek judicial review of administrative refusal to investigate his grievances?

3. Does the right of the people to petition their Government for a redress of grievances set forth in the First Amendment to the United States Constitution imply concomitant obligation on the part of the appropriate Federal agency to investigate the grievance?

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STATEMENT OF THIS COURT'S JURISDICTION

The orders of the Fifth Circuit denying petitions for rehearing were entered May 27, 1981. This Petition for Certiorari was filed within 90 days of that date.

The orders of the United States District Court for the Northern District of Georgia affirmed without opinion by the Fifth Circuit were:

Case Number	Case Name	Date of Orders
C79-2051A	Edwin F. Gordon, Plaintiff v. John Heimann, United States Comptroller of the Currency, et al., Defendants.	June 19, 1980 Order of Dismissal; July 18, 1980 Order Denying Motion for Reconsideration
C79-2052A	Edwin F. Gordon, Plaintiff v. Board of Governors of the Federal Reserve System et al., Defendants.	June 19, 1980 Order of Dismissal; July 18, 1980 Order Denying Motion for Reconsideration
C80-383A	Edwin F. Gordon, Plaintiff v. Securities and Exchange Commission, et al., Defendants.	August 21, 1980 Order of Dismissal

The orders of the District Court in the three cases appear in the Appendix.

THE CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES

First Amendment, U.S. Constitution

"Congress shall make no law. . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

Financial Institutions Supervisory Act, 12 USC 1818 (b) (1)

"Such (cease-and-desist) order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank . . . to take affirmative action to correct the conditions resulting from any such violation or practice."

Regulation "Y", Board of Governors of the Federal Reserve, Sec. 225.126, "Activities Not Closely Related to Banking", 37 Federal Register 9022, May 4, 1972:

"Pursuant to section 4 (c) of the Bank Holding Company Act and Sec. 225.4 (a) of Regulation Y, the Board of Governors has determined that the following activities are not so closely related to banking or managing or controlling banks as to be a proper incident thereto:. . . (e) Real estate syndication." (emphasis supplied)

STATEMENT OF THE CASE

Petitioner alleged that he lost over $4 million by securities frauds perpetrated upon him through the sale to him of beneficial interests in various Florida land trust syndicates. He claimed that the land syndicates in which he invested were promoted and managed by the First National Bank in Palm Beach in violation of Regulation Y of the Federal Reserve and the Glass Steagall Act, 12 USC 377, 378. Petitioner first brought his complaints to the attention of the appropriate Federal agencies, the Board of Governors of the Federal Reserve, and the Comptroller of the Currency and the Securities and Exchange Commission. Petitioner supplied these regulatory agencies with extensive records which he believed proved that the First National Bank in Palm Beach in concert with others was engaged in numerous statutory violations. However, the respective Federal agencies were uninterested in Petitioner's charges and refused to take any action whatsoever.

Petitioner thereupon brought mandamus suits

pursuant to 28 USC 1361 against each of the Federal agencies seeking to compel the agencies to perform their statutory duties and investigate his charges. However, the District Judge to whom the cases had been assigned The Honorable Robert H. Hall, U.S. District Judge of the Northern District of Georgia, decided that agency inaction with regard to charges brought is a discretionary function that is not subject to judicial review. The District Court further held that Plaintiff did not have standing to sue, relying on this Court's decision in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976). While the District Court purported to rely on 12 USC 1818 (b)(1), the District Court overlooked the fact that section gives the Board of Governors of the Federal Reserve and the Comptroller of the Currency the power to order affirmative action to correct the conditions resulting from illegal banking activities. Therefore, Petitioner has standing to pursue his complaints to the Federal

banking agencies since they are empowered by Congress to order restitution of his funds.

Petitioner appealed the dismissal of his mandamus suits to the United States Court of Appeals, Fifth Circuit which affirmed the District Court's dismissals without opinion.

ARGUMENT

This Court should grant the Petition for Certiorari. The decisions below to sanction arbitrary and capricious agency inaction are so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision. The courts below decided important Federal questions which have not been but should be settled by this Court.

I

FEDERAL AGENCY ACTION OR INACTION IS SUBJECT TO JUDICIAL REVIEW BY WAY OF MANDAMUS WHERE SUCH ACTION IS SHOWN TO BE UNREASONABLE, ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Discretionary acts by Federal administrative agencies are subject to challenge for being unreasonable, arbitrary, capricious, or an abuse of discretion. While Congress has vested in Federal agencies broad discretionary authority

and in furtherance of the regulatory scheme committed much action to agency discretion, still it is the function of a reviewing court to insure that the agency has not abused its discretion. This power of review extends to prosecutorial discretion as well.

In Nader v. Saxbe, 497 F. 2d 676 (D.C.C. 1974), Chief Judge Skelly Wright, while upholding the trial court's dismissal on grounds of mootness, nevertheless opined in footnote 19, at pp. 679-80:

> "The executive's constitutional duty to 'take care that the laws be faithfully executed' Art. II 3, applies to all laws, not merely to criminal statutes (citations). It would seem to follow that the exercise of prosecutorial discretion, like the exercise of Executive discretion generally, is subject to statutory and constitutional limits enforceable through judicial review.
>
> "(T)he decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness." (citations).

Moreover, as stated in NAACP v. Levi, 418 F. Supp. 1109 (D.C.D.C. 1976):

> "A prosecutor's chief responsibility is to see that the laws are faithfully executed and enforced in order to maintain the rule of law. He has an affirmative responsibility to investigate prudently suspected illegal activity when

it is not adequately pursued by other agencies." p.1115

"The judiciary has the responsibility of assuring that the purposes and intent of congressional enactments are not negated and frustrated by arbitrary conduct of government officials." p.1116

Similarly, the Second Circuit held in REA Express, Inc. v. CAB, 507 F.2d 42, 45 (2C. 1974):

"Congress has committed to the Board's discretion. . . the questions whether and under what circumstances it will initiate an investigation in response to a formal complaint. (citing inter alia the Fifth Circuit's decision in Transcontinental Bus System, Inc.v. CAB, 383 F. 2d 466, 478 (5C.1967). This discretion, however, is not absolute and decision by the Board is a reviewable final order under 49 USC 1486. (citations). The function of a reviewing court, in light of the nature of the Board's authority, is the limited one of ensuring that the Board has not abused its discretion." (citations).

In its supplemental order of July 18, 1980, the district court, after consideration of the Petitioner's proposed amended complaint, concluded that it, too, failed to state a claim for relief. The proposed amended complaint was predicated upon the Federal banking regulatory authority under the Financial Institutions Supervisory Act, a wide ranging statute vesting discretionary authority in the Federal Bank regulatory agencies, to apply sanctions to

compel banks' compliance with laws and regulations and safe and sound banking practices, including, inter alia, the authority under 12 USC 1818 (b) (1) to issue orders which "may. . require the bank or its directors, officers, employees, agents . . . to cease and desist from the same, and, further, to take affirmative action to correct the condition resulting from any such violation (of law, rule, or regulation) or (unsafe or unsound) practice." (Emphasis added).

Petitioner contended that he was injured by the unlawful acts of the First National Bank in Palm Beach which is regulated by the Board of Governors of the Federal Reserve and the Comptroller of the Currency and that his complaints fell on deaf ears, that the regulatory agencies took refuge behind the conventional shield for bureaucratic inaction,i.e. administrative discretion, and would do nothing. As held in Rombough v. FAA, 594 F. 2d 893, 895 (2C. 1979), the use of the word "may" plus a public interest standard in the grant of discretionary authority to implement a regulatory scheme means that

agency action (or inaction) is reviewable and the agency does not have unbridled discretion. As stated in Assoc. of Data Processing Service Org. v. Camp, 397 U.S. 150, 157 (1970), where this Court held:

"There is no presumption against judicial review and in favor of administrative absolutism." (citations).

The presumption is:

". . . there is a strong presumption in favor of the court's power to review administrative action." Medical Committee v. SEC, 432 F. 2d. 659, 666 (D.C.C.1970).

Citing L. Jaffe's Judicial Control of Administrative Action, the court stated:

> "Congress, barring constitutional impediments, may indeed exclude judicial review. But judicial review is the rule . . . It is a basic right; it is a traditional power and the intention to exclude it must be made specifically manifest. . . the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."

The Financial Institutions Supervisory Act, upon which Petitioner based his amended complaint, is replete with statutory provisions

for judicial review of bank regulatory agency cease and desist orders. Nowhere is judicial review of agency non-action precluded.

II

THE PLENARY AUTHORITY OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE AS WELL AS THE COMPTROLLER OF THE CURRENCY TO ORDER RESTITUTION PROVIDES PETITIONER WITH STANDING TO SEEK JUDICIAL REVIEW OF ADMINISTRATIVE REFUSAL TO INVESTIGATE HIS GRIFVANCES.

In dismissing the Petitioner's Complaint the District Court concluded "that the plaintiff lacks standing to assert that the court should order the defendants to . . . initiate an investigation." The District Court's rationale was predicated on the notion that "assuming that the plaintiff has been injured by illegal activities of the bank holding companies, criminal prosecution of the named individuals would not result in repayment to the plaintiff of the money he has lost". Further, the District Court concluded "that the plaintiff lacked standing to seek judicial review of the administrative decision not to investigate because 'the plaintiff has not shown an injury

to himself likely to be redressed by a favorable decision' Simon v. Eastern Kentucky Welfare Rights Organization,426 U.S. 26 at 38". In other words, "to order bank holding companies to cease-and-desist from violating banking laws, such an order would not restore any interest the plaintiff has lost in the trust accounts or land. Because the redress (investigation) the plaintiff seeks lacks the requisite nexus with his injury, the plaintiff lacks standing." The District Court's entire argument denying the Petitioner standing was premised upon the supposition that an administrative investigation into the affairs of the offending bank holding companies and their subsidiary banks would result in no relief for Petitioner.

The District Court's interpretation of the powers vested by the Financial Institutions Supervisory Act (12 USC 1818 (b)) is too narrow. In addition to the power to issue cease-and-desist orders, the Act also grants the power to compel "affirmative action" to correct the violations complained of. As stated in 12 USC

1818 (b) (1):

> "Such (cease-and-desist) order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank . . . to take affirmative action to correct the conditions resulting from any such violation or practice."

Title 12 USC 1818 (b) (3) clearly makes 12 USC 1818 (b) (1) applicable to "any bank holding company." Thus, the language of the Financial Institutions Supervisory Act goes beyond orders to cease and desist from violations of law, etc.; it includes the regulatory power to compel banks and bank holding companies to take "affirmative action" to correct the violations complained of. Contrary to the District Court's construction of the law, the regulatory agencies do have the power to redress Petitioner's injuries. If the bank holding companies and banks are found, by investigation, to have violated the law and such violations are the cause of Petitioner's injuries, then, conceivably, the banks and bank holding companies could be compelled to take "affirmative action,"

i.e., to restore Petitioner to his condition prior to the violations complained of. This could include, inter alia, a command to reimburse Petitioner for his losses. The corrective and rehabilitative scheme contemplated by Congress is broad enough to meet Petitioner's needs.

Standing, within Article III of the U.S. Constitution, is predicated on a case or controversy. Applying the district court's own concept of standing from Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976) to the Financial Institutions Supervisory Act, 12 USC 1818 (b)(1), Petitioner has standing.

III

THE RIGHT OF THE PEOPLE TO PETITION THEIR GOVERNMENT FOR A REDRESS OF GRIEVANCES SET FORTH IN AMENDMENT I OF THE UNITED STATES CONSTITUTION IMPLIES A CONCOMITANT OBLIGATION ON THE PART OF THE APPROPRIATE FEDERAL AGENCY TO INVESTIGATE THE GRIEVANCE.

In the District Court, Petitioner contended that the First Amendment right to "petition the Government for a redress of grievances" implies

a concomitant obligation on the appropriate government agency to look into grievances and on the court, an obligation to require the government agency to perform its duties, namely, to investigate the grievances. The District Court disagreed.

The history of the First Amendment right of petition, as well as logic supports Petitioner. The First Amendment as pertinent states:

> "Congress shall make no law . . . abridging . . .the right of the people. . . to petition the Government for a redress of grievances."

This provision was drawn in substantial part from the English Bill of Rights(1 Will. & Mar., Sess. 2., c. 2), 1689 (a restatement of prior law), which in subsections (5) and (13) vest in subjects of the Crown the right to petition the King and Parliament for redress of all grievances. Significantly, the refusal of King George III to consider the petitions of the Continental Congress in 1775 for redress of grievances was one of the principal causes of the Revolution.

The District Court's view that the right of petition creates no corresponding duty on the part of the appropriate government agency to investigate defeats and renders nugatory the right. The right in a citizen to petition his government for redress of grievances must necessarily require of the government some duty with respect to the petition, a duty which extends beyond merely receiving the petition, reading or filing the petition away, if that right is to have any efficacy at all. The right must be more than one to petition the government, it is a right to petition for redress of grievances. The purposes of the right cannot be achieved unless the government serves as more than a repository for complaints. At the very least the right to petition implies a duty on the government's part to consider the petition in good faith in order to ascertain its merits if the grievance is within the scope of the agency's authority to redress.

CONCLUSION

The decisions below to sanction arbitrary and capricious agency inaction are so far departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's power of supervision. The courts below decided important Federal questions which have not been but should be settled by this Court.

This Court should grant the Petition for Certiorari.

/s/ Julian D. Halliburton

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day transmitted forty (40) copies of the foregoing, with Appendix, by United States Mail, postage prepaid, to the Clerk, Supreme Court of the United States, One First Street, N.E. Washington, D.C. 20543, and I FURTHER CERTIFY that I have this day served the following by placing three copies of the foregoing, with Appendix, in the United States Mail, postage prepaid, addressed to:

Clerk, United States Fifth Circuit
Court of Appeals
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Solicitor General
United States Department of Justice
Washington, D.C. 20530

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Washington, D.C. 20549

This the 25th day of August, 1981.

/s/ Julian D. Halliburton
Julian D. Halliburton
Attorney for Petitioner

Appendix

81-559

IN THE SUPREME COURT OF THE UNITED STATES

NO. _____

Office - Supreme Court, U.S.
FILED
AUG 25 1981
ALEXANDER L. STEVAS,
CLERK

EDWIN F. GORDON,

Petitioner

v.

JOHN HEIMANN, United States Comptroller of the Currency; JOHN G. HENSEL, Regional Administrator of National Banks, Sixth National Bank Region, Atlanta, Georgia; H. GARY PANNELL, Atlanta, Georgia,

Respondents

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM: FEDERAL RESERVE BANK OF ATLANTA: MONROE KIMBREL, President, Federal Reserve Bank of Atlanta; HOBERT E. EARLY, Atlanta, Georgia,

Respondents

v.

SECURITIES AND EXCHANGE COMMISSION; JULE B. GREENE, Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOSEPH L. GRANT, Assistant Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOHN M. KELLY, Regional Counsel, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia,

Respondents

APPENDIX TO
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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Atlanta, Georgia 30329
(404) 633-0633
Attorney for Petitioner

Date: August 25, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7556

EDWIN F. GORDON,

Plaintiff-Appellant,

versus

JOHN HEIMANN, United States Comptroller of the Currency, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

(April 28, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge

PER CURIAM:

The judgment appealed from is AFFIRMED on the basis of the Order of District Judge Robert H. Hall, filed on June 19, 1980.

AFFIRMED.

*District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

FILED IN
CLERK'S OFFICE
U.S.D.C.ATLANTA
June 16, 1981

No. 80-7556

D.C. Docket No. C79-2051

Edwin F. Gordon,
Plaintiff-Appellant,

versus

JOHN HEIMANN, United States Comptroller of the Currency, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

*District Judge for the Southern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 28, 1981

A True Copy
Attested:
Clerk U.S. Court of Appeals,
Fifth Circuit

By /s/ Laura M. Young
Deputy Clerk
Atlanta, Ga. June 12, 1981

ISSUED AS MANDATE: June 12, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7556

EDWIN F. GORDON,

Plaintiff-Appellant,

versus

U.S. COURT OF APPEALS
FILED MAY 27,1981
Gilbert F. Ganucheau
Clerk

JOHN HEIMANN, United States Comptroller of the Currency, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING

(May 27, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges, THOMAS*, District Judge.

*U.S. District Judge of the Southern District of Alabama, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

Clerk's Note:

SEE RULE 41 FRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7557

EDWIN F. GORDON,

Plaintiff-Appellant,

versus

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM: ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(April 28, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge.

PER CURIAM:

The judgment appealed from is AFFIRMED on the basis of the Order of District Judge Robert H. Hall, filed on June 19, 1980.

AFFIRMED.

*District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

FILED IN CLERK'S OFFICE
U.S.D.C.-ATLANTA
JUNE 16, 1981

No. 80-7557

D.C. DOCKET NO. C79-2052

EDWIN F. GORDON,

Plaintiff-Appellant,

versus

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

---

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel:

*District Judge for the Southern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 28, 1981
A True Copy
Attested:
Clerk, U.S. Court of
Appeals, Fifth Circuit
by: /s/ Laura M. Young
Deputy Clerk
Atlanta, Ga. June 12, 1981

ISSUED AS MANDATE: June 12, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7557

EDWIN F. GORDON,
Plaintiff-Appellant,

versus

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
ET AL.,
Defendants-Appellees.

U.S. Court of
Appeals
Filed May 27, 1981
Gilbert F.Ganucheau
Clerk

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING

(May 27, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges,
THOMAS*, District Judge.

*U.S. District Judge of the Southern District
of Alabama, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP
AND LOCAL RULE 17
FOR STAY OF THE
MANDATE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7827

EDWIN F. GORDON,
Plaintiff-Appellant,

versus

SECURITIES & EXCHANGE COMMISSION,
ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(April 28, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges,
and THOMAS*, District Judge.

PER CURIAM:

The judgment appealed from is AFFIRMED on the basis of the Order of District Judge Robert H. Hall, filed on August 21, 1980.

AFFIRMED.

*District Judge for the Southern District of Alabama, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7827

FILED IN
CLERK'S OFFICE
U.S.D.C.
Atlanta
June(illegible)
1981

D.C. Docket No. C80-383A

EDWIN F. GORDON,
Plaintiff-Appellant,

versus

SECURITIES AND EXCHANGE
COMMISSION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

Before KRAVITCH and HENDERSON, Circuit Judges, and THOMAS*, District Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia and was argued by counsel;

*District Judge for the Southern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 28, 1981

A True Copy
Attested:
Clerk, U.S. Court of
Appeals, Fifth Circuit
By /s/Laura M. Young
Deputy Clerk
Atlanta, Ga.
June 18, 1981

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

No. 80-7827

EDWIN F. GORDON,

Plaintiff-Appellant,

versus

U.S. COURT OF APPEALS
FILED MAY 27, 1981
Gilbert F. Ganucheau, Clerk

SECURITIES AND EXCHANGE COMMISSION, ET AT.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(May 27, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges, THOMAS*, District Judge.

*U.S. District Judge of the Southern District of Alabama, sitting by designation.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

CLERK'S NOTE:
SEE RULE 41 FRAP
AND LOCAL RULE 17
FOR STAY OF THE
MANDATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON,	)	FILED IN CLERK'S OFFICE
	)	U.S.D.C. Atlanta
Plaintiff,	)	July 18, 1980
	)	
vs.	)	
	)	CIVIL ACTION NO. C79-
JOHN HEIMANN, Comptroller of the Currency, et al.,	)	2051
	)	
Defendants.	)	

O R D E R

The plaintiff in his motion for reconsideration has asked the court to vacate its order of June 19, 1980, dismissing this case, and to permit him to file an amended complaint. The amended complaint marks the plaintiff's third attempt to state a claim for relief. The first attempt was dismissed for failure to state a claim. Gordon v. Hensel, Civil Action No. C79-799A (May 30, 1978), (O'Kelley, J.). The second attempt was, of course, the original complaint filed in this case, C79-2051.

The court has carefully considered the plaintiff's memorandum of law and amended

complaint. The amended complaint also fails to state a claim for relief.

The court therefore DENIES plaintiff's motion for reconsideration.

So ORDERED this 18th day of July, 1980.

/s/ Robert H. Hall

ROBERT H. HALL
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON Plaintiff, vs. JOHN HEIMANN, United States Comptroller of the Currency, et al., Defendants.	FILED IN CLERK'S OFFICE U.S.D.C. ATLANTA June 19, 1980 CIVIL ACTION NO. C79-2051

O R D E R

Edwin F. Gordon has brought this mandamus action against John Heimann, Comptroller of the Currency, and other federal officials asking the court to order the defendants to investigate two national banks located in Florida and initiate criminal prosecutions against certain named persons.

The plaintiff invested in bank trust accounts which acquired title to certain real estate. The plaintiff alleges that the sale of the interest in the trust accounts and the management of the accounts violated, inter alia, the prohibition on bank tying arrangements

(whereby a bank extends one service conditioned on the bank customer's completing some other transaction at that bank), 12 U.S.C. Sect. 1972 (1980 Supp.), and the prohibition on a bank engaging in business not incidental to banking. 12 U.S.C. Sect. 24 (7) (1945 & 1980 Supp.). The plaintiff also alleges that the banks were illegally involved in the sale of securities in violation of 12 U.S.C. Sect. 78, 377, and 378 (a). The plaintiff alleges that the Comptroller has a duty to investigate the performance of national banks, Complaint Par.73,and asks the court to order an investigation and the initiation of criminal proceedings.

The defendants have moved to dismiss on the ground that the plaintiff has failed to comply with Fed. R. Civ. P. 8 and an earlier order of this court dismissing, without prejudice, a similar complaint against these defendants for failure to comply with Rule 8.

Gordon v. Heimann, Civil Action No. C79-1389A (Oct. 8, 1979) (O'Kelley, J.).[1] The defendants have also moved to dismiss on the ground that the complaint fails to state a claim on which relief may be granted.

The court will consider first the defendants' motion to dismiss on the ground that the complaint fails to state a claim. Fed.R. Civ. P. 12 (b) (6).

The defendants have argued that the Comptroller's duty to investigate a bank for violations of statutes and regulations and to initiate criminal prosecutions is discretionary, and that mandamus will not lie to direct the exercise of discretion.[2]

[1] An earlier complaint for mandamus relief against these defendants has been dismissed for failure to state a claim for which relief can be granted. Gordon v. Hensel, C78-799A (May 30, 1978) (O'Kelley, J.).

[2] The defendants have also argued that the Comptroller has conducted, at the behest of the plaintiff, an investigation into the affairs of the banks and found no evidence of wrong-doing. Whether the Comptroller made an investigation and what he learned are questions of fact which cannot be resolved on a motion to dismiss for failure to state a claim. Moreover, the correspondence which the Comptroller entered in the record has not been properly authenticated.

In response, the plaintiff has argued that he has a First Amendment right to petition the government for the redress of grievances and that the government has "more than a duty to merely listen to and then to ignore the plaintiff's pleas," the government has a duty "to act in good faith with respect to the grievance." Plaintiff's Reply to Defendants' Motion to Strike, p.4. The Plaintiff's theory as discussed in this reply is predicated on a cause of action, implied from the First Amendment, not only to petition to government for a redress of grievances but to compel the government to redress his grievances. The plaintiff cites De Jonge v. Oregon, 229 U.S. 353 (1937), Thomas v. Collins, 323 U.S. 516 (1945), and Sierra Club v. Butz, 349 F. Supp. 934 (D.C.Cal. 1972), in support of his theory. These cases are inapposite. De Jonge held that "peaceful assembly for lawful discussion cannot be made a crime," supra at 365, and Thomas held that the state could not require prior registration as a condition for exercising one's First Amendment rights. Supra at 541. Both cases

struck down criminal convictions. In Sierra Club v. Butz, the court dismissed counterclaims filed by a timber logging company against the Sierra Club for failure to state a claim. The counterclaims were tort actions for money damages against the club based on the Sierra Club's persuading the Forest Service to reduce permissible timber sales in wilderness areas.

None of these cases has anything to do with the plaintiff's cause of action. The plaintiff has freely exercised his First Amendment right to petition various federal agencies. The plaintiff is now seeking to compel agency action on the theory that his right to petition the government creates in the government a corresponding duty to act. The court refuses to imply this cause of action from the First Amendment.

Although not mentioned in his reply memorandum, the plaintiff has also predicated his complaint on the Comptroller's authroity to examine national banks contained in 12 U.S. C. Section 481. Complaint Paragraph 72.

That section provides, "The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank twice in each calendar year, but the Comptroller, in the exercise of his discretion, may waive one such examination or cause such examinations to be made more frequently if considered necessary. The waiver of one such examination as above provided shall not be exercised more frequently than once during any two-year period. The examiner making the examination of any national bank shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency . . ." The plaintiff has not alleged that the Comptroller has failed to make the examination required by this statute but evidently seeks an investigation or examination broader in scope than that

authorized by this section. Nothing in this code section creates a mandatory duty enforceable by the plaintiff for the Comptroller to begin an investigation broader than the twice-yearly bank examination. Moreover, this section confers no authority on the Comptroller to initiate criminal proceedings.

The Comptroller also has authority to issue cease-and-desist orders against a national bank which is engaging in unsafe or unsound banking practices. 12 U.S.C. Sections 1813 (q) and 1818 (b) (1). The authority granted is discrectionary. "If, in the opinion of the appropriate Federal banking agency"--in this case the Comptroller--any insured bank is engaging or has engaged, or the agency has "reasonable cause to believe" that the bank is about to engage in any unsafe or unsound practice or to violate any law, rule or regulation, "the agency may issue and serve upon the bank" a notice of charges (emphasis added). 12 U.S.C. Section 1818 (b) (1). The notice of charges must fix a time for a hearing, and judicial

review of final agency cease-and-desist orders is by the courts of appeals. 12 U.S.C. Section 1818 (h). This general regulatory framework is outlined in Groos National Bank v. Comptroller of Currency, 573 F. 2d 889, 894 (5th Cir. 1978).

Nothing in this section creates a mandatory enforcement duty in the Comptroller which the plaintiff is entitled to enforce. The provisions for judicial review relate to those against whom cease-and-desist orders are issued. 12 U.S.C. Section 1818 (h). Thus, the plaintiff has asked the court to review agency action but has pointed to no statute authorizing that review.[3] The Administrative Procedure Act does not require a different result since it

[3]Although the defendants have not raised the point, the plaintiff certainly lacks standing to seek the prosecution of named persons. Linda R.S. v. Richard D., 410 U.S. 614 (1973); Nader v. Saxbe, 497 F. 2d 676, 681 & n. 27 (D.C. Cir. 1974). The court is also of the opinion that the plaintiff lacks standing to seek an investigation because the Comptroller, even after an investigation, cannot redress the injury the plaintiff has allegedly suffered (loss of $4.1 million). Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976). The plaintiff may institute suits against private persons for violations of the banking and securities laws and has done so. The plaintiff's interest in using information in his private law suits which could be developed by the Comptroller is not a judicially cognizable interest.

does not authorize review of decisions committed by law to agency discretion. 5 U.S.C. Sect. 701 (a) (2). The decision by the Comptroller to investigate or bring criminal charges in a specific case is an enforcement decision not reviewable by the court. The plaintiff has not stated facts or a legal theory which would authorize the court to order an investigation or initiation of criminal proceedings.

This suit is DISMISSED for failure to state a claim for relief.

So ORDERED this 19 day of June, 1980.

/s/ Robert H. Hall
ROBERT H. HALL
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C.-ATLANTA
JULY 18, 1980

EDWIN F. GORDON,

Plaintiff,

vs.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, et al.,

Defendants.

CIVIL ACTION NO.
C79-2052

O R D E R

The plaintiff has filed a motion for reconsideration which asks the court to vacate its order of June 19, 1980, dismissing the plaintiff's complaint for lack of standing, and to grant leave to the plaintiff to file an amended complaint.

After careful review of the plaintiff's memorandum of law and amended complaint, the court DENIES the motion for reconsideration.

So ORDERED this 18th day of July, 1980.

/s/ Robert H. Hall

ROBERT H. HALL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON,	)	FILED IN CLERK'S OFFICE
	)	U.S.D.C.-ATLANTA
Plaintiff,	)	JUNE 19, 1980
	)	
vs.	)	
	)	CIVIL ACTION
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM; FEDERAL RESERVE BANK OF ATLANTA; MONROE KIMBREL, President Federal Reserve Bank of Atlanta; HOBART E. EARLY, Atlanta, Georgia,	)	NO. 79-2052
	)	
Defendants.	)	

O R D E R

The plaintiff Edwin F. Gordon has brought this mandamus action against the Board of Governors of the Federal Reserve System, the Federal Reserve Bank of Atlanta, Monroe Kimbrel, president of the Federal Reserve Bank of Atlanta, and Hobart E. Early, attorney for the Federal Reserve Bank of Atlanta. All defendants have moved to dismiss on the ground that the court lacks subject matter jurisdiction and on the ground that the plaintiff lacks standing.

Counts 1 and 2 of the complaint are evidently intended as background information

for the court. In count 1 the plaintiff alleges that two banks, their parent companies (which are bank holding companies) and various individuals defrauded the plaintiff of over $4.1 million dollars through violations of federal securities laws and banking regulations. Count 2 alleges that defendant Early as an attorney with the Federal Reserve Bank of Atlanta should have known of the fraud perpetrated on the plaintiff and that defendant Early has been so derelict in the performance of his duties that he has become a "party to and an aider and abetter of the conspiracy to defraud plaintiff." [1] Complaint Paragraph 67.

[1]The remedy the plaintiff seeks is not to collect damages from defendant Early but to order him to investigate his own activities. The plaintiff has had substantial difficulty in pleading his case. The plaintiff's previous complaint in this matter was dismissed without prejudice for failure to comply with the requirement that the complaint contain a short, plain statement of the facts. Fed. R. Civ.P. 8 (a). Gordon v. Board of Governors, Civil Action No. C79-1427A (Oct. 8, 1979) (O'Kelley, J.).

Count 3 is the core of the complaint against the defendants. It alleges that the Board of Governors has an "affirmative duty" to investigate the legal activities of banks and their parent companies. Complaint Paragraph 70 (a). The plaintiff alleges that unless the Board of Governors intervenes, he will suffer irreparable harm from the ongoing conspiracy against him. Complaint Paragraph 70 (b). The plaintiff also alleges that despite his numerous demands, the Board of Governors has failed to exercise its powers and duties and investigate the activities of the bank holding companies.

The plaintiff also alleges that certain named individuals should be prosecuted in connection with the fraud. He states that as a private citizen he cannot bring criminal charges himself, Complaint Paragraph 74, that the Board has failed "to set in motion the processes of criminal justice" Complaint Paragraph 73, and that the court should order the defendants to "set in motion the processes

of criminal justice" against certain named individuals. Complaint Paragraph 75 (b) and Prayer for Relief.

The complaint suffers from two defects: it is prolix yet incomplete. The plaintiff describes at length the wrongdoings of almost everyone except the defendants. The court has had difficulty in sifting the allegations to determine the gravamen of the plaintiff's complaint against the Board of Governors, the Federal Reserve Bank and the other defendants. The defendants have filed a motion to dismiss or strike on the grounds that the complaint does not comply with Fed. R. Civ.P.8 or the court's order of October 12, 1979, and that the complaint contains vituperative and scandalous material in violation of Rules 12 (f) and 11. Fed.R.Civ.P. Although the complaint might very well be subject to dismissal on those grounds, the court prefers to decide the case based on whether the plaintiff has standing and whether a claim for relief is stated. As the court reads the complaint, the plaintiff is asking

the court to order the defendants to investigate the banks and the bank holding companies and to bring criminal charges against those individuals named in the complaint. The statutes which either the banks or the bank holding companies allegedly violated include the Glass-Steagall Act, 12 U.S.C. Sections 24(7) and 378(a), and the Bank Holding Company Act, as amended. 12 U.S.C. Sections 1841-1849 and 1972.

STANDING

The inquiry into the standing of the plaintiff insures that the suit meets the Art. III requirement for the exercise of judicial power -- that an actual case or controversy exists. In addition to its constitutional dimension, the concept of standing also serves the prudential concerns of courts to limit the class of persons who may invoke the court's power. Warth v. Seldin, 422 U.S. 490, 498-499 (1975). The Supreme Court stated the test for standing in Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38 (1976):

"(W)hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself likely to be redressed by a favorable decision. Absent such a showing exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III (case or controversy) limitation."

The complaint specifically and repeatedly asks the court to order the defendants to initiate criminal proceedings against named individuals. This request is contrary to the basic American rule that a court will not control the exercise of prosecutorial discretion, which is stated in Linda R.S. v. Richard D., 410 U.S. 614 (1973). In that case the mother of an illegitimate child sought to challenge the state court construction of a Texas statute which held that only parents of legitimate children have a duty of support to their children and that the parents of illegitimate children have no duty of support. The mother

sought an injunction "running against the district attorney forbidding him from declining prosecution (of the father of her illegitimate child) on the ground that the unsupported child is illegitimate." Id. at 616. The court held that the plaintiff mother lacked standing, because "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." Id. at 619. The court recognized that the plaintiff had an interest in securing support payments for her child. The court found however that even if appellant were granted the requested relief it would only result in jailing of the child's father. The prospect that prosecution would result in the payment of support was termed "speculative." Id. at 618.

The court finds that this case is in a similar posture. Assuming that the plaintiff has been injured by illegal activities of the bank holding companies, criminal prosecution of

the named individuals would not result in repayment to the plaintiff of the money which he has lost. Because jailing certain named individuals would not redress the plaintiff's injury, the plaintiff lacks standing to seek their criminal prosecution. See Nader v. Saxbe, 497 F.2d 676, 681 n.27 (D.C. Cir. 1974); Hourigan v. Carter, 478 F.Supp. 16 (N.D. Ill. 1979).

The court must also determine whether the plaintiff has standing to assert that the court should order the Federal Reserve Board to begin an investigation into the activities of the bank holding companies. In other words, the plaintiff ask the court to review the administrative discretion exercised in making a decision not to investigate the activities of the bank holding companies.[2] The plaintiff

[2]The plaintiff has certainly not established that the defendants totally failed to investigate his complaint, and the court does not wish to imply that no investigation was made. On a motion to dismiss, the court is obliged to construe the complaint in the light most favorable to the plaintiff and assume that its allegations are true. Warth v. Seldin, 422 U.S. 490, 501 (1975).

alleges that the decision not to investigate was arbitrary and capricious and that the court may review this agency action.

The court finds that the plaintiff lacks standing to seek judicial review of the administrative decision not to investigate because "the plaintiff has not shown an injury to himself likely to be redressed by a favorable decision." Simon v. Eastern Kentucky Welfare Rights Organization, supra, at 38.

The banks and bank holding companies, who with certain named persons have allegedly defrauded the plaintiff, have completed the alleged fraud. The plaintiff states in his own complaint that he has been forced to forfeit his interest in the trust accounts and the land which was the subject of the accounts.[3]

[3]The plaintiff in Paragraph 40 of the complaint has alleged that the fraud is on-going. This conclusory allegation is insufficient because the other paragraphs of the complaint state affirmatively that the plaintiff has been forced to forfeit his interests in the trust accounts and land subject to those accounts.

Complaint Paragraphs 37, 40, 41, 43, 45, 46. Although the Board of Governors admits that it has the authority under 12 U.S.C. Section 1818 (b) (3) (1969 & 1979 Supp.) to order bank holding companies to cease-and-desist from violating banking laws, such an order would not restore any interest the plaintiff has lost in the trust accounts or land. Because the redress (investigation) the plaintiff seeks lacks the requisite nexus with his injury, the plaintiff lacks standing.

This conclusion is buttressed by the decision in Nader v. Saxbe, supra. In that case, Ralph Nader sought to mandamus the Attorney General to prosecute violators of the Federal Corrupt Practices Act. The complaint alleged the existence of a Justice Department policy not to prosecute violators which deprived voters, such as the plaintiff, of important information about candidates for federal office. The court found that the plaintiff had not sought any relief, such as damages, for injuries resulting from the allegedly unlawful policies of the Justice Department but rather had sought only

prospective relief to encourage compliance. The court found that the prospective relief could not encourage compliance because the Act had been repealed.

In this case, the plaintiff has not sought to challenge any general policy of the Board of Governors or the Federal Reserve Bank's. Instead, he seeks judicial review of the alleged administrative decision not to investigate his complaint. But the defendants through an investigation cannot remedy the plaintiff's loss of his investments.

The plaintiff has stated in his brief that "(h)ad the defendants acted in good faith upon the plaintiff's complaints . . . the defendant could have used appropriate statutory sanctions . . . to secure redress of the plaintiff's grievances" (emphasis added). Perhaps at an earlier time the defendants "could have used" appropriate sanctions, but the prospective relief the plaintiff seeks cannot remedy his injury.

In addition, the decision whether to commit agency resources to an investigation is part of the general enforcement decision which Congress has

committed to the Board of Governors. See 12 U.S.C. Section 1818 (b). The Supreme Court has stated that the actual or threatened injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing . . ." Linda R. S. v. Richard D., supra at 617 n. 3; See Warth v. Seldin, 422 U.S. 490, 501 (1975). Statutes for some regulatory agencies create mandatory enforcement duties for those agencies and a means by which those duties can be enforced. See K. Davis, 2 Administrative Law Treatise Section 9:5, pp. 229-239 (2d ed. 1979) (collecting statutes and cases). The plaintiff does not point to any statute that creates a mandatory enforcement duty for the Board of Governors; the treatise does not refer to the bank regulatory statutes as creating mandatory enforcement duties; and the court cannot locate such a statute.

The court concludes that the plaintiff lacks standing to assert that the court should order the defendants to bring criminal charges against named persons or to initiate an investigation.[4]

The complaint, for the reasons stated above, is DISMISSED.

So ORDERED this 19 day of June, 1980.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

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[4]This decision on standing assumes that the plaintiff's claim is otherwise justiciable. Simon v. Eastern Kentucky Welfare Rights Organization, supra, at 38. Professor Davis has stated that "to focus upon the law of standing, we must assume that a legislative or judicial determination has previously been made that the particular type of governmental action should be subject to review. Our question is: when, if ever, should a plaintiff who is in fact hurt by reviewable governmental action be denied review for lack of standing." K. Davis, 3 Administrative Law Treatise Sect.22.02, p.211 (1st ed. 1958). The court wishes to emphasize that only for purposes of this order was the assumption made that the plaintiff's claim was otherwise justiciable. The defendants have also argued that the plaintiff has failed to state a claim for which relief might be granted. The court takes no position on this issue. The court must consider standing first because standing, whether in the Art. III case or controversy requirement or as a reflection of prudential considerations, is a threshold determinant of the plaintiff's right to bring suit. Linda R. S. v. Richard D., supra at 616; see Warth v. Seldin, supra at 518.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C.-ATLANTA
AUG. 21, 1980

EDWIN F. GORDON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. C80-383A
SECURITIES AND EXCHANGE COMMISSION, ET AL.,	)	
	)	
Defendants.	)	

O R D E R

Edwin Gordon alleges that he lost over $4 million through a securities fraud perpetrated upon him through the sale of shares of the beneficial interest in land trust syndications in Florida. He has filed this complaint for a declaratory judgment and injunctive relief against the Securities and Exchange Commission (SEC) and several of their regional officers. The plaintiff alleges that the defendants have a duty to investigate violations of the federal securities acts and that he has presented them with evidence of such violations. He asks this court to issue a judgment stating

the defendants' duties under the securities laws and ordering them to undertake an investigation of the plaintiff's charges, including initiating the criminal prosecution of certain named parties.

The defendants have moved to dismiss on the grounds that the court lacks jurisdiction of the case and that the complaint fails to state a claim for which relief can be granted. Fed. R. Civ.P. 12(b) (1) and (6).[1]

The defendants have argued that the securities acts authorize the SEC to conduct in its discretion such administrative investigations as it deems necessary to aid

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[1]The court has earlier dismissed similar complaints filed against the Federal Reserve Board, Gordon v. Board of Governors, No. C79-2052A (N.D.Ga. June 19, 1980), and the Comptroller of the Currency. Gordon v. Heimann, No. C79-2051A (N.D. Ga. June 19, 1980).

it in effectuating the purposes of the federal securities laws. These sections, and similar sections, have consistently been interpreted to mean that the SEC's decision to refrain from conducting an investigation is not subject to judicial review. Kixmiller v. Securities and Exchange Commission, 492 F. 2d 641 (D.C. Cir. 1974); see Dyer v. Securities and Exchange Commission, 291 F. 2d 774 (8th Cir. 1961).

In response, the plaintiff has argued that administrative action is generally subject to judicial review and that if a plaintiff alleges abuse of administrative discretion, the courts should review that action. With two exceptions, the cases cited by the plaintiff are inapposite because they do not concern judicial review of the administrative decision not to investigate or not to prosecute particular charges. The exceptions are NAACP v. Levi, 418 F.Supp. 1109, (D.D.C. 1976), and REA Express v. Civil Aeronautics Board, 507 F.2d 42 (2d Cir. 1974). REA Express is

an interpretation of the Federal Aviation Act of 1958. In that case, the court found that the Civil Aeronautics Board's discretion in deciding whether to initiate an investigation in response to a formal complaint is made reviewable by 49 U.S.C. Section 1486. REA Express does not aid the plaintiff in the instant case which is concerned solely with the reviewability of an SEC decision not to investigate particular charges. The plaintiff has not cited any section of the securities acts providing for judicial review of the administrative decision not to pursue certain charges which is comparable to 49 U.S.C. Section 1486. On the contrary, the securities acts specifically commit the decision to investigate to agency discretion.[2]

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[2]15 U.S.C. Sect. 77t (a) provides, "Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed (thereunder), have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement ...as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts." (Emphasis added).
(Cont. on Page 45)

The Administrative Procedure Act also exempts from judicial review decisions committed by law to agency discretion. 5 U.S.C. Section 701 (a) (2).

The second decision cited by the plaintiff, Levi v. NAACP, supra, follows Nader v. Saxbe, 497 F.2d 676 (D.C. Cir. 1974), which established the law in the District of Columbia Circuit that general enforcement policy decisions are reviewable for abuse of prosecutorial discretion. But the Levi decision specifically noted the language in Nader which stated that "the instant complaint does not ask the courts to assume the essentially Executive function of deciding

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[2](Cont.)
15 U.S.C. Section 78u(a) provides, "The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this chapter or any rule or regulation thereunder . . ." (Emphasis added).

whether a particular alleged violator should be prosecuted. Rather, the complaint seeks a conventionally judicial determination of whether certain fixed policies allegedly followed by the Justice Department and the United States Attorney's office lie outside the constitutional and statutory limits of 'prosecutorial discretion.'" 418 F. Supp. at 1116, quoting Nader v. Saxbe, 497 F.2d at 679. In this case, however, the plaintiff asks the court to review not a policy of the Securities and Exchange Commission but rather the facts of his own case. Even under the Nader and Levi decisions, this complaint fails to state a cause of action.

The plaintiff has also contended that he has a first amendment right to petition the government which "implies an obligation on the government's part to look into the plaintiff's complaints and on the court to require the defendant to perform its Congressionally mandated duties, namely to

investigate the complaint." Plaintiff's Response to Defendant's Motion to Dismiss at 9.

This court has previously rejected the plaintiff's view of the first amendment that his right to petition the government creates in the government a corresponding duty to act. Gordon v. Heimann, supra, at 3. Thus, the plaintiff has not stated under the first amendment a valid, implied cause of action.

Since the plaintiff would not be entitled to relief under any set of facts he could prove in support of his complaint, the defendants' motion to dismiss is GRANTED.

So ORDERED this 21st day of August, 1980.

/s/ Robert H. Hall
ROBERT H. HALL

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. C 80-383A

EDWIN F. GORDON,

Plaintiff,

vs. JUDGMENT

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

This action came on for consideration before the Court, Honorable ROBERT H. HALL, United Stated District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,.

It is Ordered and Adjudged that the Plaintiff take nothing, that the action be dismissed, and that the Defendants, SECURITIES AND EXCHANGE COMMISSION: JULE B. GREENE, Regional Administrator, Atlanta Regional Office, Securities and Exchange

Commission, Atlanta, Georgia; JOSEPH L. GRANT, Assistant Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOHN M. KELLY, Regional Counsel, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia, recover of the Plaintiff, EDWIN F. GORDON, their costs of action.

Dated at Atlanta, Georgia, this 2nd day of September, 1980.

FILED AND ENTERED
IN CLERK'S OFFICE
September 2nd, 1980
BEN H. CARTER, CLERK
BY/s/A. Burns
Deputy Clerk

BEN H. CARTER
Clerk of Court
BY:/s/ A. Burns
A. Burns
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON, Plaintiff, v. JOHN HEIMANN, United States Comptroller of the Currency, ROBERT J. HERRMANN, Regional Administrator of National Banks, Sixth National Bank Region, H. GARY PANNELL, Regional Counsel, Sixth National Bank Region, Defendants.	)	CIVIL ACTION File #79-2051 AMENDED COMPLAINT

COMES NOW, EDWIN F. GORDON, and files this his Amended Complaint by deleting all parts of the original Complaint and substituting in its stead the following:

1.

Plaintiff, EDWIN F. GORDON, is a natural person who resides in the State of Florida.

2.

Defendant JOHN G. HEIMANN is the Comptroller of the Currency, who is the Chief Administrative Officer of the Bureau of the Comptroller of the Currency, a Bureau of the

U. S. Department of the Treasury. He maintains his executive offices in Washington, D. C. Said Defendant is charged by 12 USC 1 et seq. with the examination, supervision, and regulation of national banks.

3.

Defendant ROBERT J. HERRMANN is the current Regional Administrator of National Banks, Sixth National Bank Region, Atlanta, Georgia, charged with regional supervisory authority over national banks in South Carolina, Georgia and Florida. He maintains his offices in Atlanta, Georgia. He is a subordinate of Defendant HEIMANN.

4.

Defendant H. GARY PANNELL is Regional Counsel of the Comptroller, Sixth National Bank Region. He maintains his office and resides in Atlanta, Georgia. He is a subordinate of Defendants HEIMANN and HERRMANN.

5.

This Court has jurisdiction over the subject matter of this action pursuant to

5 U.S.C. 702, 28 USC 1331 and 28 USC 1361. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

6.

The Defendants have responsibility for the examination, supervision, and regulation of the First National Bank in Palm Beach, Palm Beach, Florida, and the First National Bank and Trust Company of Riviera Beach, Riviera Beach, Florida (hereinafter called the "Banks"), pursuant to 12 USC 1 et seq. to assure their compliance with Federal laws and regulations and with safe and sound banking practices.

7.

The Plaintiff, in conferences with the Defendants and/or their agents, by letter communications and otherwise, has on numerous occasions brought to Defendants' attention information involving the participation of the First National Bank in Palm Beach, Palm Beach, Florida, as participant in schemes and devices to manipulate the prices and sales of

securities sold to the Plaintiff and, in connection with the efforts of the First National Bank and Trust Company of Riviera Beach, Florida, to forfeit the interests of the Plaintiff in certain securities, causing the Plaintiff to suffer losses in excess of $4 million, all in continuing violation of Federal banking and securities laws.

8.

The Plaintiff on numerous occasions has requested the Defendants to examine the affairs of said banks and to investigate the Plaintiff's charges in an effort to obtain relief, and to otherwise compel said banks to cease and desist from such violations of law as alleged above and to take affirmative action to correct the violations complained of.

9.

The Defendants have refused to inquire into Plaintiff's complaints or otherwise to employ their examining, supervisory, or regulatory powers to investigate Plaintiff's

complaints, and to impose sanctions upon the Banks pursuant to law to cause the same to cease and desist from violations of Federal securities and banking laws, and to take affirmative steps to cure the causes of Plaintiff's grievances. Said refusal of Defendants is unreasonable, arbitrary, capricious, and otherwise not in compliance with law, and a gross abuse of discretion and constitutes nonfeasance and/or misfeasance of office.

10.

As a result of Defendants' nonfeasance and/or misfeasance of office in refusing to act, Plaintiff has suffered and continues to suffer great and irreparable damage and injury, for which there is no adequate remedy at law.

WHEREFORE, the Plaintiff prays for:

(a) An Order requiring the Defendants to inquire into those matters complained of by Plaintiff in order to determine the truth and

substance thereof, and, if it should be found that the Plaintiff suffered losses as a result of the illegal activities of the First National Bank in Palm Beach and the First National Bank and Trust Company of Riviera Beach in participating in a fraud upon the Plaintiff in violation of the Federal securities and/or banking laws, to fashion appropriate sanctions and relief by way of cease and desist orders and/or affirmative action under the Financial Institutions Supervisory Act 12 USC 1818 and/or other provisions of Federal law;

(b) That this Court retain jurisdiction of this matter until such time as it is satisfied that the Defendants have carried out their mandate under Federal law and the orders of this Court;

(c) Such other relief as this Court deems proper.

Julian D. Halliburton

Attorney for Plaintiff
Edwin F. Gordon

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(404) 633-0633, 577-6900

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON, Plaintiff, v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE BANK OF ATLANTA, ROBERT P. FORRESTAL, First Vice President, Federal Reserve Bank of Atlanta; and HOBART EARLY, Attorney, Federal Reserve Bank of Atlanta, Defendants	) CIVIL ACTION) File No.79-) 2052)AMENDED)COMPLAINT

COMES NOW, EDWIN F. GORDON, and files this his Amended Complaint by deleting all parts of the original Complaint and substituting in its stead the following:

1.

Plaintiff, EDWIN F. GORDON, is a natural person who resides in the State of Florida.

2.

Defendant BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM is an agency of the United States which maintains its offices in Washington, D.C.

3.

Defendant FEDERAL RESERVE BANK OF ATLANTA is an agency of the United States which maintains its offices in Atlanta, Georgia.

4.

Defendants ROBERT P. FORRESTAL and HOBART EARLY are First Vice President and Attorney of the FEDERAL RESERVE BANK OF ATLANTA and maintain their offices in Atlanta, Georgia.

5.

This Court has jurisdiction over the subject matter of this action pursuant to 5 USC 702, 28 USC 1331 and 28 USC 1361. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

6.

The Defendants have responsibility for the examination, supervision and regulation of the Lykes Financial Corporation and the Southeast Merger Company (formerly First Bancshares of Florida, Inc.) and their subsidiaries pursuant to the Bank Holding Company Act 12 USC 1841-1850 to assure their

compliance with Federal law and regulations and with safe and sound banking practices.

7.

The Plaintiff, in conferences with the Defendants and/or their agents, by letter communications and otherwise, has on numerous occasions brought to Defendants' attention information involving the participation of Lykes Financial Corporation and its subsidiary, First National Bank in Palm Beach, Florida, as participants in schemes and devices to manipulate the prices and sales of securities sold to the Plaintiff, and in connection with the efforts of Southeast Merger Company and its subsidiary, First National Bank and Trust Company of Riviera Beach, Florida, to forfeit the interests of the Plaintiff in certain securities, causing the Plaintiff to suffer losses in excess of $4 million, in continuing violation of Federal banking and securities laws.

8.

The Plaintiff, on numerous occasions, has requested the Defendants to examine the affairs of said holding companies and to investigate the Plaintiff's charges in an effort to obtain relief, and to otherwise compel said holding companies and their subsidiaries to cease and desist from such violations of law as alleged above and to take affirmative action to correct the violations complained of.

9.

The Defendants have refused to inquire into Plaintiff's complaints or otherwise to employ their examining, supervisory, or regulatory powers to investigate into Plaintiff's complaints and to impose sanctions upon the holding companies and their subsidiaries pursuant to law to cause the same to cease and desist from violations of Federal securities and banking laws and to take affirmative steps to cure the causes of

Plaintiff's grievances. Said refusal of Defendants is unreasonable, arbitrary, capricious, and otherwise not in compliance with law, and a gross abuse of discretion and constitutes nonfeasance and/or misfeasance of office.

10.

As a result of Defendants' nonfeasance and/or misfeasance of office in refusing to act, Plaintiff has suffered and continues to suffer great and irreparable damage and injury, for which there is no adequate remedy at law.

WHEREFORE, the Plaintiff prays for:

(a) An order requiring the Defendants to inquire immediately into those matters complained of by Plaintiff in order to determine the truth and substance thereof, and if it should be found that the Plaintiff suffered losses as a result of the illegal activities of the Lykes Financial Corporation and its subsidiary, First National Bank

in Palm Beach, and the Southeast Merger Company and its subsidiary, First National Bank and Trust Company of Riviera Beach, in participating in a fraud upon the Plaintiff in violation of the Federal securities and/or banking laws, to fashion appropriate sanctions and relief by way of cease and desist orders and/or affirmative action under the Financial Institutions Supervisory Act 12 USC 1818 and/or other provisions of Federal law;

(b) That this Court retain jurisdiction of this matter until such time as it is satisfied that the Defendants have carried out their mandate under Federal law and the orders of this Court;

(c) Such other relief as this Court deems proper.

JULIAN D. HALLIBURTON
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EDWIN F. GORDON, Plaintiff, v. SECURITIES AND EXCHANGE COMMISSION; JULE B. GREENE, Regional Administrator, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia; JOSEPH L. GRANT, Assistant Regional Administrator, Atlanta Regional Office, Securities and Eschange Commission, Atlanta, Georgia, JOHN M. KELLY, Regional Counsel, Atlanta Regional Office, Securities and Exchange Commission, Atlanta, Georgia. Defendants.	FILED IN CLERK'S OFFICE U.S.D.C.-ATLANTA MARCH 6, 1980 CIVIL ACTION FILE NO.C-80-383A COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1.

Plaintiff, Edwin F. Gordon, is a natural person who resides in the State of Florida.

2.

Defendant, SECURITIES AND EXCHANGE

COMMISSION, is an agency of the United States charged by law with the enforcement of the Federal Securities Acts. Its southern regional offices are located at 1375 Peachtree Street, N.E., Suite 788, Atlanta, Georgia where Defendant GREENE, Defendant GRANT and Defendant Kelly are employed as executive officials charged by law with the enforcement of the Federal Securities Acts.

3.

This court has jurisdiction over the subject matter of this action pursuant to 28 USC 2201 and 2202, 28 USC 1331, 5 USC 702, 15USC 77a, et seq., 15 USC 78a, et seq., and the First Amendment of the U.S. Constitution. The amount in controversy, exclusive of interest and costs, exceeds $10,000.00.

4.

The Defendants have plenary authority and the duty to investigate violations of the Federal securities acts, specifically the Securities Act of 1933(15 USC 77a, et seq.) and the Securities Exchange Act of

1934 (15 USC 78a, et seq.), and to impose sanctions for the correction of such violations, including the investigation and initiation of civil and criminal actions to secure compliance and correct violations of said acts.

5.

The Plaintiff has suffered losses in excess of $4 million as a result of the failure of several private persons in Florida and elsewhere and of the First National Bank in Palm Beach, Palm Beach, Florida, and of the First National Bank & Trust Company of Riviera Beach, Riviera Beach, Florida to comply with the Securities Act of 1933 and as a result of fraudulent schemes and manipulative devices in connection with the sale to him of securities in the form of shares of beneficial interests in land trust syndications and limited partnership interests in violation of Section 10b of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

(a) The Plaintiff, by numerous oral and written communications, has informed the Defendants of the above-mentioned violations and has requested the Defendants to investigate the same and to consider imposing appropriate sanctions to secure a redress of Plaintiff's grievances.

(b) Specifically, Plaintiff has notified Defendants, that under the five-year criminal statute of limitations, 18 USC 3282, very little time remains for criminal charges to be brought against some of the malefactors in the Gordon matters. Plaintiff has demanded that the Defendants carry out their Congressionally mandated duties to use the special securities expertise of the Defendants to forthwith do the detailed investigative work with respect to criminal securities law violations by the malefactors, for the presentation of such investigative file to the United States

Department of Justice so as to set in motion the processes of criminal justice for indictment and prosecution of the malefactors as provided by law.

7.

Defendants have refused to investigate Plaintiff's complaints or to otherwise enforce the Federal Securities laws.

8.

As a result of Defendants' refusal to act, the Plaintiff has suffered immediate and irreparable injury and harm which injury and harm is continuing.

9.

Plaintiff is without knowledge or guidance and is in great doubt as to his rights under the Federal securities acts with respect to the Defendants' role in investigating his complaints and in seeking redress of the same.

10.

Defendants' refusal to act is a final act under the Administrative Procedures Act

inimical to the interests of the Plaintiff, and violative of the statutes of the United States of America.

WHEREFORE, the Plaintiff demands:

(a) A judgment declaring that the Defendants are authorized and obligated by the Federal securities acts to investigate complaints alleging violations of said acts;

(b) An injunction requiring the Defendants to commence an investigation of Plaintiff's complaints and to initiate appropriate sanctions to secure redress of the same, including but not limited to the taking of official notice by the Defendants of the evidence of violations of federal statutes that has been presented to them and to this honorable Court by the Plaintiff and to take official action to set in motion the processes of criminal justice to bring the appropriate criminal charges against the named parties and any others involved and to see to the prosecution as charged of those named parties and any

others involved, in cooperation with the United States Department of Justice as provided by law.

(c) Such other and further relief as the Court deems just and proper in the circumstances.

/s/Julian D. Halliburton
Julian D. Halliburton
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OF COUNSEL:

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5 U.S.C. 702

Section 702. Right of Review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or title), and their successors in office, personally responsible for

compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat.392; Pub.L 94-574, Section 1, Oct. 21, 1976, 90 Stat. 2721.

28 U.S.C. 1331

Section 1331. Federal Question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor

is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, Section 1, 72 Stat. 415.

28 U.S.C. 1361

Section 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub.L. 87-748, Section 1 (a), Oct. 5, 1962, 76 Stat. 744.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C.-ATLANTA
MAY 7, 1980

EDWIN F. GORDON,

Plaintiff,

vs.

JOHN HEIMANN, et al.,

Defendants.

CIVIL ACTION NO. C79-2051A

EDWIN F. GORDON,

Plaintiff,

vs.

BOARD OF GOVERNORS, et al.,

Defendants.

CIVIL ACTION NO. C79-2052A

EDWIN F. GORDON,

Plaintiff,

vs.

H. GARY PANNELL, et al.,

Defendants.

CIVIL ACTION NO. C79-2375A

EDWIN F. GORDON,

Plaintiff,

vs.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

CIVIL ACTION NO. C80-383A

O R D E R

Edwin Gordon has brought the four law suits named above. Defendants in all cases have filed motions to dismiss. Plaintiff has sought to depose a number of persons in all four cases; motions for protective orders have been filed in all cases. In response to these motions for protective orders, plaintiff has deferred some of the depositions.

The court has the power to manage the discovery process so that the litigation does not unnecessarily exhaust the parties' resources of time and money. Fed.R.Civ.P. 26(c). The court finds that the motions to dismiss may end each of these cases; therefore, taking depositions could be a needless expenditure of time and money. The court orders that discovery in these four cases is STAYED until the court rules on the motions to dismiss.

This stay MOOTS the motions listed below:

C79-2051A: Federal Employees' (Kimbrel, Pannell, Early and Hermann) Motion for a Protective Order

Plaintiff's Motion for an Extension of Time to Respond to Objections to Subpoenas Duces Tecum

C79-2052A: Federal Employees' Motion for a Protective Order

Plaintiff's Motion for an Extension of Time to Respond to Objections to Subpoenas Duces Tecum

C79-2375: Defendants' Joint Motion for Protective Order filed March 17, 1980 (Broberg, First National Bank in Palm Beach, Lykes, Rudy, Ferguson, Deveer and Myers)

Federal Defendants' Motion for Protective Order filed March 21, 1980

Defendants' Joint Motion for Protective Order filed March 26, 1980 (Green and the Heminway Corp.)

Plaintiff's Motion for an Extension of Time to Respond to Objections to Subpoenas Duces Tecum

C80-383: Defendants' Motion for a Protec-
Order filed April 25, 1980

Federal Employees' Motion for a Protective Order filed April 30, 1980

Plaintiff's Motion for an Extension of Time to Respond to Defendants' Motion for a Protective Order.

Plaintiff has also filed a Motion for an Extension of Time to Respond to Defendants' Motion to Dismiss in C80-383. The motion is GRANTED; plaintiff has through May 9, 1980, to respond.

In summary, the court orders a STAY of all discovery which MOOTS a number of pending motions. Plaintiff's motion for an extension of time in C80-383 is GRANTED.

So ORDERED this 7th day of May, 1980.

/s/ Robert H. Hall
ROBERT H. HALL
UNITED STATES DISTRICT JUDGE

Quotation of portion of Regulation "Y", Board of Governors of the Federal Reserve System, Sec.225.4(a), with respect to "Activities Not Closely Related to Banking" and "Real estate syndication", Regulation "Y", 37 Federal Register 9022, May 4, 1972, beginning with the words "Pursuant to section 4(c) of the Bank Holding Company Act. . ."

Sections 4(a) and 4(c) (8) of the Bank Holding Company Act, 12USC Sec.1843(a) and Sec.1843(c) (8)respectively, prohibiting bank holding companies and banks from engaging in non-banking activities either directly or through a subsidiary company unless the activities are so closely related to banking or managing or controlling banks as to be a proper incident thereto; and Sec.225.126, Regulations of the Federal Reserve System "Activities Not Closely Related to Banking", (Reg.Y, 37 Federal Register 9022, May 4, 1972, which provides in pertinent part:

"Pursuant to section 4(c) of the Bank Holding Company Act and Sect.225.4(a) of Regulation Y, the Board of Governors has determined that the following activities are not so closely related to banking or managing or controlling banks as to be a proper incident thereto" . . . (c) Real estate syndication." (emphasis supplied)

(Financial Institutions Supervisory Act)
12 U.S.C. 1818(b)

Cease-and-desist proceedings

(b) (1) If, in the opinion of the appropriate Federal banking agency, any insured bank, bank which has insured deposits, or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such a bank is engaging or has engaged, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent or other person participating in the conduct of the affairs of such bank is about to engage, in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the agency has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the agency

in connection with the granting of any application or other request by the bank or any written agreement entered into with the agency, the agency may issue and serve upon the bank or such director, officer, employee, agent, or other person a notice of charges in respect thereof. The notice shall contain a statement of the facts constituting the alleged violation or violations or the unsafe or unsound practice or practices, and shall fix a time and place at which a hearing will be held to determine whether an order to cease and desist therefrom should issue against the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or a later date is set by the agency at the request of any party so served. Unless the party or parties so served shall appear at

the hearing personally or by a duly authorized representative, they shall be deemed to have consented to the issuance of the cease-and-desist order. In the event of such consent, or if upon the record made at any such hearing, the agency shall find that any violation or unsafe or unsound practice specified in the notice of charges has been established, the agency may issue and serve upon the bank or the director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank an order to cease and desist from any such violation or practice. Such order may, by provisions which may be mandatory or otherwise, require the bank or its directors, officers, employees, agents, and other persons participating in the conduct of the affairs of such bank to cease and desist from the same, and, further, to take affirmative action to correct the conditions resulting from any such violation or practice. (emphasis added)

(2) A cease-and-desist order shall become

effective at the expiration of thirty days after the service of such order upon the bank or other person concerned (except in the case of a cease-and-desist order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable as provided therein, except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(3) This subsection and subsections(c) through (f)and(h)through(n) of this section shall apply to any bank holding company, and to any subsidiary (other than a bank) of a bank holding company, as those terms are defined in the Bank Holding Company Act of 1956, and to any organization organized and operated under sec.25A of the Federal Reserve Act or operating under sec.25 of the Federal Reserve Act, in the same manner as they apply to a State member insured bank. Nothing in this subsection or in. . .

Section 377. Affiliation with organization dealing in securities; penalties

After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities: Provided, That nothing in this paragraph shall apply to any such organization which shall have been placed in formal liquidation and which shall transact no business except such as may be incidental to the liquidation of its affairs.

For every violation of this section the member bank involved shall be subject to a penalty not exceeding $1,000 per day for

each day during which such violation continues. Such penalty may be assessed by the Board of Governors of the Federal Reserve System, in its discretion, and, when so assessed, may be collected by the Federal reserve bank by suit or otherwise.

If any such violation shall continue for six calendar months after the member bank shall have been warned by the Board of Governors of the Federal Reserve System to discontinue the same, (a) in the case of a national bank, all the rights, privileges, and franchises granted to it under chapter 2 of this title may be forfeited in the manner prescribed in sections 141, 222-225, 281-286, and 502 of this title, or, (b), in the case of a State member bank, all of its rights and privileges of membership in the Federal Reserve System may be forfeited in the manner prescribed in sections 321-332 of this title. June 16, 1933, c. 89, Section 20, 48 Stat. 188; Aug. 23, 1935, c. 614, Sections 203 (a), 302,49 Stat.704, 707.

Section 378

Dealers in securities engaging in banking business; individuals or associations engaging in banking business; examinations and reports; penalties

(a) After the expiration of one year after June 16, 1933, it shall be unlawful---

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: Provided, That the provisions of this paragraph shall not prohibit national banks or State banks

or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title: Provided further, That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate; or

(2) For any person, firm, corporation, association, business trust, or other similar organization to engage, to any extent whatever with others than his or its officers, agents or employees, in the business of receiving deposits subject to check

or to repayment upon presentation of a pass book, certificate of deposit, or other evedence of debt, or upon request of the depositor, unless such person, firm, corporation, association, business trust, or other similar organization (A) shall be incorporated under, and authorized to engage in such business by, the laws of the United States or of any State, Territory, or District, or (B) shall be permitted by any State, Territory, or District to engage in such business and shall be subjected by the law of such State, Territory, or District to examination and regulation, or (C) shall submit to periodic examination by the banking authority of the State, Territory, or District where such business is carried on and shall make and publish periodic reports of its condition, exhibiting in detail its resources and liabilities, such examination and reports to be made and published at the same times and in the same

manner and under the same conditions as required by the law of such State, Territory, or District in the case of incorporated banking institutions engaged in such business in the same locality.

(b) Whoever shall willfully violate any of the provisions of this section shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both, and any officer, director, employee, or agent of any person, firm, corporation, association, business trust, or other similar organization who knowingly participates in any such violation shall be punished by a like fine or imprisonment or both. June 16, 1933, c. 89, Section 21, 48 Stat. 189; Aug. 23, 1935, c. 614, Section 303, 49 Stat. 707.

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT (I)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT (II)

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT (III)

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT (IV)

The right of the people to be secure

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT (V)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the . . . .